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AMENDMENT AND AIDER OF PLEADINGS

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HISTORICAL BACKGROUND

AMENDMENTS of pleadings at the early common law were rather liberally allowed. In ancient times, when the pleadings were by word of mouth, the parties were permitted to correct them during the oral altercation.¹ Holdsworth states that "a survival of the old idea that a pleader's words were not binding till avowed by his client no doubt made it the more possible to treat pleas as capable of amendment till one was reached by which counsel would abide."² But by the 14th and 15th centuries, as oral pleadings were superseded by written pleadings and formalism increased, abuses grew up and cases were constantly thrown out of court and judgments arrested and reversed for errors of form.³ It became necessary for Parliament to provide a remedy, and this it attempt-

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¹Williston's *Stephen, Pleading* 81; *Rush v. Seymour*, (1712) 10 Mod. 88.

²Holdsworth, *Pleading*, 2 *Select Essays in Anglo-American Legal History*, 628. The learned author cites *Y. B. 3 Ed. II (S.S.)* 129, and *Introd. lxvi, lxvii*, and goes on to say: "Whether or not this was so, it was quite clear, as Reeves says (*H.E.L. II*, 223) that everything advanced by counsel was, in the first instance, 'treated as matter only in fieri which upon discussion and consideration might be amended, or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such grounds as he could trust. Where he finally rested his cause, that was the plea which was entered upon the roll, and abided the judgment of an inquest or of the court, according as it was a point of law or fact.'"

³Williston's *Stephen, Pleading* 107.

ed to do by a series of statutes, called Statutes of Jeofails⁴ and Amendments.⁵

Stephen states that "At certain stages of the cause, all objections of form are cured by the different statutes of jeofails and amendments, the cumulative effect of which is to provide that neither after verdict, nor judgment by confession, nil dicit or non sum informatus, can the judgment be arrested or reversed by any objection of that kind."⁶ Under these statutes pleadings could be amended in the discretion of the court for any defect of form, even under some authorities to the extent of changing the form of action.⁷ Each statute provided a remedy for some new abuse, or extended the time during which a preceding statute was to run.

Thus the power of the court to allow amendments was gradually increased. During the reign of William IV these powers were still further enlarged by statute,⁸ the judges at nisi prius being given the power of amending at trial, in case of variance. Previously at common law no amendment could be allowed except by the full bench of the court sitting at Westminster, as the judges

⁴The statute was termed the Statute of Jeofails "because, if a pleader saw and acknowledged the error (Jeo faille) he was allowed to amend . . . These statutes were passed to remedy the fact that writs of error were brought and judgments reversed on account of merely verbal errors on the record." 1 Holdsworth, *A History of English Law*, 3rd ed., 223.

⁵The first Statute of Jeofails was passed in 1340, 14 Ed. III, C. VI. It is as follows: "Item, it is assented, That by the Misprision of a Clerk in any Place wheresoever it be, no Process shall be annulled, or discontinued, by mistaking in Writing one Syllable or one Letter, too much or too little; (2) but as soon as the Thing is perceived, by Challenge of the Party, or in other manner, it shall be hastily amended in due Form without giving Advantage to the Party that Challengeth the same because of such Misprision."

The second Statute of Jeofails was enacted in 1384, 8 Rich. II, C. IV. This is quoted and the other statutes are stated chronologically in the Appendix at the end of this article. For a thorough and detailed review of the Statutes of Jeofails and their effect, see 2 Tidd. Practice, 953 to 960; 3 Blackstone, Commentaries, 407.

⁶Williston's Stephen, Pleading 161.

⁷1 Chitty's Pleading, 16th ed., 220; Bryant, Code Pleading, 2nd ed., 278. But the more usual view seems to have been that the form of action could not be changed. See discussion in a later section. The Statutes of Jeofails extended only to defects in form, not substance. Defects of substance at common law could be taken advantage of by general demurrer. The states of the United States adopting the common law forms of procedure enacted the substantial provisions of the Statutes of Jeofails. The Illinois Statutes of Amendments are typical, embodying the essential common law requirements. See Smith's Ill. Rev. Stats. 1921, chap. 7, p. 46.

⁸(1833) 3 & 4 Wm. IV, c. 42. See Appendix.

on circuit were authorized to try only issues raised by the pleadings, not to alter the pleadings.⁹

The next step was taken as a part of the reforms embodied in the Common Law Procedure Act of 1852. Here provision was made for amendments at the trial particularly affecting parties, that no pleading should be insufficient for a defect formerly reached by special demurrer, and generally for all amendments necessary to determine the real question in controversy.¹⁰ No important changes occurred thereafter¹¹ until the sweeping reforms brought about in 1873 and 1875 with the passage of the Supreme Court of Judicature Acts. The rules under the Act of 1873 provided: "The court or a judge may at any stage of the proceedings allow either party to alter his statement of claim or defense or reply or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties."¹² The rules under the Act of 1875, which are substantially continued to date, repeated the foregoing

⁹Scott, *Fundamentals of Procedure in Actions at Law*, 156.

¹⁰Common Law Procedure Act of 1852, 15 & 16 Vict. c. 76, which provided in sec. 35 for amendments at the trial when there was a non-joinder and a misjoinder of parties plaintiff; sec. 37, amendments for misjoinder of defendants before or at trial in contract actions; sec. 38, amendments on plea in abatement for nonjoinder of defendants in contract actions; sec. 40, that where an amendment of any pleading was allowed, no new notice to plead thereto should be necessary, also defining the time within which the opposite party should be required to plead thereto; sec. 51, that "no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer," thus overruling (1885) Stat. 27 Eliz. c. 5; sec. 222, that it shall be lawful for the Superior Courts of Common Law and every judge thereof and any judge sitting in *Nisi Prius*, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be made."

¹¹The Common Law Procedure Act of 1854, 17 & 18 Vict. c. 125, sec. 96, was a repetition of sec. 222 of the Common Law Proc. Act of 1852, except that it was made to apply to any proceeding under the "provisions of this Act" instead of "in civil causes" and added "if duly applied for" at the end. The Common Law Proc. Act of 1860, 23 & 24 Vict. chap. 126, sec. 36, repeated sec. 96 of the Act of 1854.

¹²36 & 37 Vict. Rules of Procedure, R. 18, p 353.

rule¹³ and went on to make provision for plaintiff's amending without leave,¹⁴ for defendant's amending his set-off or counterclaim without leave,¹⁵ for application by the adverse party to disallow the amendment,¹⁶ for application by the adverse party to plead to the amended pleading or amend his own,¹⁷ for allowing either party to apply for amendment in cases not covered by the preceding provisions,¹⁸ for limiting the time during which an order for leave to amend might be taken advantage of,¹⁹ for the manner in which a pleading might be amended,²⁰ for the way in which an amended pleading should be marked²¹ and for delivery to the opposite party of the amended pleading.²² In addition to these at the present time are three rules, one providing for the correction of clerical mistakes in judgments or orders arising from an accidental slip or omission;²³ another giving the court general power

¹³38 & 39 Vict., 1st Schedule, Rules of Court, Order 28, Rule 1; Annual Practice 1927, O. 28, r. 1, ("In such manner and on such terms as may be just.")

¹⁴Ibid., n. 14, Rule 2, "once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared." Ann. Prac. 1927, O. 28, r. 2 (adding provision for ten day period where defence is delivered and no order is made for a reply.)

¹⁵Ibid., Rule 3, (before the expiration of the time allowed him for pleading to the reply and before pleading thereto, or in case there be no reply, then within twenty-eight days from the filing of his defence.) Ann. Prac. 1927 O. 28, r. 3.

¹⁶Ibid., Rule 4 (within eight days after the delivery to him, the court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just.) Ann. Prac. 1927 O. 28, r. 4.

¹⁷Ibid., Rule 5, providing for application for leave to amend; Ann. Prac. 1927. O. 28, r. 4 provides for pleading to the amended pleading or amending within eight days.

¹⁸Ibid., Rule 6; Ann. Prac. 1927, O. 28, r. 26 ("application for leave to amend any pleading may be made by either party in all cases not covered by the preceding rules, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just").

¹⁹Ibid., Rule 7; Ann. Prac. 1927, O. 28, r. 7 (14 days unless otherwise provided or unless extended by the court or a judge).

²⁰Ibid., Rule 8. "A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith as necessary, unless the amendments require the insertion of more than 144 words in any place, or are so numerous or of such a nature that the making them in writing, would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended." See also Ann. Prac. O. 28, r. 8.

²¹Ibid., Rule 9; Ann. Prac. 1927. O. 28, r. 9, (must be marked with date of the day, if any, and date of amendment.)

²²Ibid., Rule 10; Ann. Prac. 1927, O. 28, r. 10.

²³Ann. Pac. 1927, O. 28, r. 11.

to amend in any proceedings for the purpose of determining the real question in controversy,²⁴ and the third providing that the costs of an amendment shall be borne by the party making the same unless the court or a judge shall otherwise order.²⁵ Thus in England has the discretionary power of the courts to grant amendments been increased by gradual degrees until the present very liberal system has been established.²⁶

THE CODE PROVISIONS

The provisions in the code states in the United States have many analogies to the present English practice. In many codes, a whole chapter is given to amendments and generally in the others numerous sections are devoted to the subject. In practically all states there are also statutes dealing with the effect of variance between pleading and proof.²⁷ The statutes on amendments provide first for amendments without leave of court if made within a certain period, and second, for amendments by permission of the court.

Amendments Without Leave. Of these, the Montana statute furnishes an example:

"Any pleading may be once amended by the party of course, and without costs, at any time before answer or demurrer filed or twenty days after demurrer and before the trial of the issue thereon, by filing the same as amended and serving a copy on the adverse party, who may have twenty days thereafter in which to answer, reply or demur to the amended pleading."²⁸

And a number of codes add a provision, of which this is typical:

"But if it shall be made to appear to the court that such amendment was made for the purpose of delay or that the same was unnecessary and the opposite party will thereby lose the benefit of a term for which the action is or may be noticed, the amended

²⁴Ibid., r. 12; covering any proceedings, while Rule 1, n. 13 supra, was limited to the pleadings proper. See also Jud. Act. 1873, S. 34 (7); Jud. Act. 1925, S. 43.

²⁵Ibid., r. 13; Ann. Prac. 1927, o. 28, r. 13.

²⁶As to the policy of the English courts in allowing amendments, see *Tildesley v. Harper*, (1878) 10 Ch. Div. 393, 397, Bramwell, L. J.: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting male fide or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." And see *Clarapede v. Commercial Union Ass'n*, (1884) 32 W. R. 263; *Lowther v. Heaven*, (1889) 41 Ch. Div. 248, 254; *Re Crighton and Law*, etc., Corp. Ltd., [1910] 2 K. B. 738.

²⁷These are discussed in a later section.

²⁸Mont. Rev. Codes 1921, sec. 9186.

pleading may be stricken out and such terms imposed as to the court may seem just."²⁹

Under the English rule as we have seen a party may amend "without leave" under somewhat similar conditions, but the adverse party may, within eight days after the delivery to him of the amended pleading, apply to the court to disallow the amendment, and the court may do so if satisfied that the justice of the case requires it.³⁰ As Hepburn has pointed out, the right of amendment conferred as "of course" or "without leave" is not absolute in either the American or English systems,³¹ the latter giving the court a wider power of supervision.³²

Amendments With Leave of Court. These are provided for in the codes by one or the other of the following statutes, common to most of the code states, with only minor variations in wording:

"The court may on motion, in furtherance of justice and on such terms as may be proper, amend any pleading, or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of a party, or a mistake in any other respect; and may upon like terms enlarge the time for an answer, replication or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in any other particular, and may upon like terms, allow an answer to be made after the time limited by this act."³³

²⁹Wis. Stat. 1921, sec. 2685. Often this provision is incorporated in the same section with allowance of pleadings as of course, since it is a limitation on that provision. Such is the Wisconsin statute. Other codes which have sections similar to the Montana and Wisconsin statutes, with but slight changes in wording are: Alaska Code 1913, sec. 922; Ark. Dig. Stat. 1921, sec. 1237, (complaint only); Calif. C. C. P. 1923, sec. 472; Conn. Gen. Stat. 1918, sec. 5664, (complaint only); Idaho, Comp. Stat. 1919, sec. 6725; Burns, Ind. Ann. Stat. 1926, sec. 421; Kan. Rev. Stat. 1923, sec. 60-756, (complaint only); Ky. Carrol's Civ. Code 1927 sec. 132, (complaint only); Minn. G. S. 1923, sec. 9279; Mo. Rev. Stat. 1919, sec. 1278, (complaint only); Neb. Comp. Stat. 1922, sec. 8653, (complaint only); Nev. Rev. L. 1912, sec. 141; N. M. Ann. Stat. 1915, sec. 4161; N. Y. C. P. A. 1927, sec. 244; N. C. Cons. Stat. 1919, sec. 545; N. D. Comp. L. 1913 sec. 7481; Ohio Gen. Code 1926, sec. 11360, complaint; sec. 11361, adverse party after demurrer; Okla. Rev. L. 1921, sec. 315, complaint; sec. 316, adverse party after demurrer; Or. Code 1920, sec. 100; S. C. Code of 1922, sec. 435; S. D. Rev. Code 1919, sec. 2376; Utah Comp. L. 1917, sec. 6618; Wis. Stat. 1919, sec. 2685; Wyo. Comp. Stat. Ann. 1920, sec. 5704, complaint; sec. 5705, adverse party after demurrer.

³⁰Note 16, *supra*.

³¹Hepburn, Development of Code Pleading 270.

³²Cf. note 26, *supra*. "The reformed procedure is held to prescribe a rule of conduct rather than a rigid law." Hepburn, *op. cit.* 272.

³³Colo. C. C. P. 1921, sec. 81. For similar provisions with some variation in wording see Ariz. Rev. Stat. 1913, sec. 422, amended in 1925, Ariz. Laws 1925, p. 35; Calif. C. C. P. 1923, sec. 473; Conn. Gen.

"The court may at any time in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."³⁴

There are seventeen code states which have statutes containing the limitation of the latter statute, apparently restricting the amendment to one which does not change substantially the claim or defense. There are eleven which do not contain such limitation.³⁵ But as pointed out in a later section hereof, it is often read into the statute by judicial decision and a serious restriction on the power to amend is thereby developed.³⁶

Form of the Amendment. Some of the codes have provisions as to the form an amendment must take. Alaska provides that an amended pleading must be complete in itself, without reference to the original or any preceding amended one.³⁷ Colorado provides that if the complaint is amended, a copy of the amendment shall be filed, or that the court in its discretion may require the complaint as amended to be filed.³⁸ Indiana requires that every motion to insert or strike out any part of any pleading shall be made in writing and set forth the words sought to be inserted or stricken out;³⁹ Iowa, that an amendment shall not be made by erasure or interlineation, but on a separate paper which shall be filed and constitute with the original but one pleading.⁴⁰

Stat. 1918, sec. 5664; Idaho Comp. Stat. 1919, sec. 6726; Burns, Ind. Ann. Stat. 1926, sec. 423; Mont. Rev. Code 1921, sec. 9187; Nev. Rev. L. 1912, sec. 142; N. Y. C. P. A. 1927, sec. 111; Utah, Comp. L. 1917, sec. 6619 Remington, Wash., Comp. Stat. 1922, sec. 303.

³⁴The above quotation is from Ark. Dig. Stat. 1921, sec. 1239. For other codes limiting the amendment to one which does not change substantially the claim or defense, see Iowa, Comp. Code 1927, sec. 11182; Kan. Rev. Stat. 1923, sec. 60-759; Carroll's Ky. Civ. Code, 1927, sec. 134; Mo. Rev. Stat. 1919, sec. 1274; Minn. G. S. 1923, sec. 9280; Neb. Comp. Stat. 1922, sec. 8656; N. M. Ann. Stat. 1915, sec. 4162; N. C. Comp. Stat. 1919, sec. 547; N. D. Comp. Laws Ann. 1913, sec. 7482; Ohio Gen. Code 1926, sec. 11363; Okla. Rev. L. 1921, sec. 318; Or. Laws, C. C. P. 1920, sec. 102; S. C. Code L. 1922, sec. 436; S. D. Rev. Code 1919, sec. 2377; Wis. Stat. 1921, sec. 2669a; Wy. Comp. Stat. 1920, sec. 5707.

³⁵See note 33, *supra*.

³⁶See discussion below.

³⁷Alaska Comp. L. 1913, sec. 927. To the same effect is N. M. Ann. Stat. 1915, sec.—; Or. C. C. P. 1920, sec. 105; Remington Wash. Comp. Stats. 1922, sec. 304.

³⁸Colo. C. C. P. 1921, sec. 59.

³⁹Burns, Ind. Ann. Stat. 1926, sec. 424.

⁴⁰Iowa Code 1927, sec. 11184.

Where there is no statutory direction as to the form of an amendment, it seems to lie in the discretion of the court. The rule is fairly general that the application to amend should be supported by affidavit setting forth the reason for the application;⁴¹ or for the delay, if there has been one.⁴² The motion to amend must not be too general.⁴³ It has been stated that amendments may be made in three ways, (1) by a new and separate pleading, (2) by an additional paragraph, (3) by interlineation or mutilation,⁴⁴ though there are some courts which frown upon an amendment made in the last-mentioned method.⁴⁵

Three papers are necessary in making the motion for leave to amend in New York; (a) a notice of motion; (b) the original pleading; and (c) an affidavit containing the proposed amended pleading. The latter need not be made a part of the affidavit, but

⁴¹*Rodman Imp. Co. v. Krabo*, (1918) 185 App. Div. 882, 171 N. Y. 617; *Beauchamp v. Retail Merchants Ass'n Ins. Co.*, (1917) 38 N. D. 483, 165 N. W. 545; *Cunningham v. Huson Ice & Coal Co.*, (1921) 26 Ga. App. 302, 105 S. E. 860; *Copeland v. Hugo*, (1925) 212 App. Div. 129, 207 N. Y. S. 466; *Bates v. Smiley*, (1920) 179 N. Y. S. 552. Where the application of a foreign corporation to amend its complaint in a material respect was based on the affidavit of its attorney, the source of information on which he asked the amendment must be stated. *Goodwin Preserving Co. v. Holton*, (1917) 167 N. Y. S. 46. And an affidavit to amend a claim in the court of claims can be made by the attorney instead of the party himself only when the attorney sets forth in the affidavit the source of his information. *Murray v. State*, (1920) 182 N. Y. S. 360.

⁴²*Garrison v. Goodale*, (1892) 23 Or. 311, 31 Pac. 709; *Foxwell v. Justice*, (1921) 191 Ky. 749, 231 S. W. 509; *Andrew v. Benight-Latcham Carpet Co.*, (1922) 72 Colo. 472, 211 Pac. 378; *Holbert v. Allred*, (1920) 24 Ga. App. 727, 102 S. E. 192.

⁴³*Gordon v. Anderson*, (1922) 200 App. Div. 616, 193 N. Y. S. 665. (amendment denied when the motion was to "conform pleadings to proof."); *Barker v. Walbridge*, (1869) 14 Minn. 469 (amendment not allowed when party asked for it to enable him to "invoke the equity powers of the court."); *Camp v. Pollock*, (1895) 45 Neb. 771, 64 N. W. 231, (denied when leave was asked to amend complaint generally.); *Smith v. Rhodes*, (1903) 680 Ohio St. 500, 68 N. E. 7, (amendment asked "so as to make excluded evidence complete" was not sufficient.); *Alben v. Ranson*, (1869) 44 Mo. 263.

⁴⁴*Fleenor v. Taggart*, (1888) 116 Ind. 189, 18 N. E. 606. Cf. the English rule, note 20, *supra*, and see *Sutherland, Code Pleading, Practice and Forms*, sec. 792. See *Turner v. Hamilton*, (1905) 13 Wyo. 408, 80 Pac. 664, (petition amended by filing a statement of amendment and designating by reference where the new matter was to be inserted in the original or stricken out. This statement and the original petition are to be construed together as the amended one).

⁴⁵*Doane v. Houghton*, (1888) 75 Cal. 360, 17 Pac. 426; *Farrelly v. Cross*, (1849) 10 Ark. 197; *Hill v. The Supervisors*, (1858) 10 Ohio St. 621; *Schneider v. Hosier*, (1871) 21 Ohio St. 98. *Contra, McKee v. Jolly*, (1919) 72 Okla. 37, 178 Pac. 656; *Newman v. Buzard*, (1901) 24 Wash. 225, 64 Pac. 139. For forms especially applicable to the Western states, see *Sutherland, op. cit.* secs. 842 to 859.

unless it is very simple and can be understood from the affidavit, it should be attached to the affidavit.⁴⁶

AMENDMENTS CHANGING THE CAUSE OF ACTION

From the statutes quoted above it appears that certain states provide that the court has discretion to conform the pleading or proceedings to the facts proved, "when the amendment does not change substantially the claim or defense." It further appears that a substantial number do not in terms so restrict the power to amend and that the states generally grant the power to amend to a party once without leave of court and apparently without restriction as to change of the claim or defense.⁴⁷ It might be concluded from this that in all code states a single amendment at least could be made substantially changing the form of the action and that in many such an amendment could be made substantially without limit. Such an assumption would be erroneous, as the courts seem to have been greatly troubled by amendments which, as usually expressed, "changed the cause of action." The wording of the statutes which contain the limitation would seem to restrict it to amendments made after proof, that is, at the trial. As pointed out in the next section, the further advanced a case is, the more hesitation the court has in granting a change in the action. Hence courts are stricter when the amendment is offered at the trial than when offered earlier. Some codes do not apply the present rule to amendments offered before trial. It seems to have been the view, at least on the part of many, perhaps the greater number, of code states, however, that an amendment changing the cause of action was improper whenever offered.⁴⁸ There seems to be a tendency towards greater liberality at the present time, and as pointed out in succeeding paragraphs any such dogmatic statement would probably now be misleading.

Origin of the Rule. Whence came this rule, with so little direct basis in the statutes? The answer seems clear, that like many other restrictions applied under the code it came from habits of thought developed under the formulary system of the common law. Not that the common law was entirely clear, for especially under the later common law there are many cases allowing a change

⁴⁶Carmody's New York Practice, sec. 270

⁴⁷See statutes notes 29, 33, 34 above.

⁴⁸See cases cited below, this section.

from one form to another.⁴⁹ But it seems to have been the more usual rule that an amendment would not be allowed if it changed the form of action, as from assumpsit to covenant or case, or from trespass to case or vice versa.⁵⁰ The test often stated was, did the proposed amendment change the action "from law to law?" A change from one form of legal recovery to another was thus frowned upon.⁵¹ In fact since the formulary system of the common law served to separate different issues of fact, the problem confronting the courts which applied the stricter rule seems in general one of variation in legal theory, rather than in the facts upon which recovery is asserted.

The Rule Under the Codes. We have seen elsewhere that under the code the concept "cause of action" was developed as a restriction on the extent of a single claim in an action, somewhat in substitution of the common law forms of action.⁵² The tendency of many courts was, therefore, to apply it as a restriction on amendment. And with it was taken over the common law objection of allowing a shift in the pleadings from law to law. Consequently many courts came to apply the rule so that a change in the legal theory of the action was considered a change in the cause of action.⁵³ Elsewhere have been stated reasons why it is believed

⁴⁹*Stebbins v. Lancashire Ins. Co.*, (1879) 59 N. H. 143, overruling *Little v. Morgan*, (1855) 31 N. H. 499; *Smith v. Bellows*, (1875) 77 Pa. St. 441; *Philadelphia B. & W. R. Co. v. Gatta*, (1913) 4 Boyce (Dela.) 38, 85 Atl. 721; *McLaughlin v. West End. St. Ry. Co.*, (1904) 186 Mass. 150, 71 N. E. 317; *Ala. Co. v. Heald*, (1908) 154 Ala. 580, 45 So. 686. The rule in the federal courts was liberal in this respect. *Chapman v. Barney*, (1889) 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 803; *Magruder v. Belt*, (1895) 7 App. D. 302; but Cf the earlier cases of *Walden v. Boadley*, (1840) 14 Pet. (U.S.) 156, 10 L. Ed. 398, and *Snead v. McCaule*, (1851) 12 How (U.S.) 407, 13 L. Ed. 1043.

⁵⁰*Shipman*, *Common Law Pleading*, 3rd ed., 296. *Scott*, *Fundamentals of Procedure in Actions at Law* 154; *Chitty*, *Pleading*, 16th Am. ed., 109; *Knight v. Trim*, (1897) 89 Me. 469, 36 Atl. 912; *Flanders v. Cobb*, (1896) 88 Me. 488, 34 Atl. 277; *Sumner v. Broun*, (1861) 34 Vt. 194; *People v. Circuit Judge*, (1865) 13 Mich. 206; *Carpenter v. Gookin*, (1829) 2 Vt. 495; *Perry*, *Common Law Pleading* 101. See generally 34 Am. Dec. 158 note; 51 Am. St. Rep. 410 note.

⁵¹*Hall v. Louisville, etc. Co.*, (C.C.Fla. 1907) 157 Fed. 464; *Despeau v. Pa., etc. Co.*, (C.C.Pa. 1904) 133 Fed. 1009; *Wingert v. Circuit Judge*, (1894) 101 Mich. 395, 90 N. W. 662; *Church v. Boylston, etc., Co.*, (1914) 218 Mass. 231, 105 N. E. 883; *Fournier v. Detroit United Ry.*, (1909) 157 Mich. 589, 122 N. W. 229; *Anderson v. Wetter* (1907) 103 Me. 257, 69 Atl. 105; *Bradley v. Chicago, etc., Co.*, (1908) 231 Ill. 622, 83 N. E. 424; *Chicago, etc., Co. v. Jones*, (1894) 149 Ill. 361, 37 N. E. 247.

⁵²See articles cited in note 54 infra.

⁵³*Hallett v. Larcom*, (1897) 5 Idaho 492, 51 Pac. 108, (substitution of new plaintiff as being the real party in interest refused as a new cause of action); *Elder v. Idaho-Wash. Northern Idaho R. R.*, (1914) 26 Idaho 209, 141 Pac. 982; *Hackett v. Bank of Cal.*, (1881) 57 Cal. 335,

that such a conception of "cause of action" is not in harmony with the code as a whole, with specific provisions of the code such as the requirement of "stating the facts constituting the cause of action," and is wholly inconvenient as a practical rule. If the cause of action is taken as a group of facts giving rise to one or more rights of action, it is thought that a more workable rule is obtained. The number of such facts to be considered as a single unit will vary in different cases, but should be governed by reasons of practical convenience, and a change in such facts should not be a change in the cause of action so long as the essential fact situation remains the same. Nor, since the idea of the code is that the pleader should confine himself to the facts, leaving so far as possible the legal theory to be developed at the argument and applied by the court, should the legal theory be any part of the cause of action. Under this more flexible view of the restriction it is possible to allow amendments more freely where they relate to the same general acts or events set forth in the original pleading.⁵⁴ As a matter of fact, probably most courts would now hesitate to apply the harsher rule where important rights are involved. The case of amending after the statute of limitations has run, discussed below, is a case in point.⁵⁵

The Rule in the Federal Courts. The federal rule has been of much influence, due not merely to the position of these courts in our judicial system, but also to the fact that many important cases come before the federal courts particularly with reference to amending in actions for death of an employee of the great interstate railroads. These courts early took a liberal attitude toward

(no amendment from tort to contract); *Haas Bros. v. Hamburg-Bremen Fire Ins. Co.*, (1910) 181 Fed. 916, 104 C. C. A. 354; *Givens v. Wheeler*, (1882) 6 Colo. 149 (no amendment from contract to tort); *Anderson v. Groesbeck*, (1899) 26 Colo. 3, 55 Pac. 1086; *Anthony v. Slayden*, (1900) 27 Colo. 144, 60 Pac. 826; *Gibbons v. Denver Brokerage & Cons. Co.*, (1902) 17 Colo. App. 167, 67 Pac. 913 (amendment from equity to law not allowed, and vice versa); *Cincinnati Hamilton & Dayton R. R. Co. v. Bunnell*, (1878) 61 Ind. 183; *Lewark v. Carter*, (1888) 117 Ind. 205, 20 N. E. 119; *Anderson v. Harper*, (1902) 30 Wash. 378, 70 Pac. 965; (but cf. *Van Behren v. Rettkowski*, (1905) 37 Wash. 247, 79 Pac. 787.) See notes 34 Am. Dec. 158; 51 Am. St. Rep. 414; 3 L. R. A. (N.S.) 289, 47 L. R. A. (N.S.) 67.

⁵⁴*Clark*, the Code Cause of Action, 33 Yale L. J. 817, 837; *Clark*, Joinder and Splitting of Causes of Action, 25 Mich. L. Rev. 393, 420. For another view of cause of action, see *McCaskill*, Actions and Causes of Action, 34 Yale L. J. 614. But see 34 Yale L. J. 879. Certain law review notes advocating a harsher rule are noted, note 110, *infra*.

⁵⁵See, in addition to that discussion, cases cited hereinafter in this section.

allowing amendments.⁵⁶ Later there was a shift to a stricter attitude due largely to the case of *Union Pacific Co. v. Wyler*⁵⁷ where an employee of a railroad was not allowed to change the basis of his claim for damages for injury from the common law to a Kansas statute. To the argument that all the necessary facts were stated in the original petition, Mr. Justice White replied:

"If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law."⁵⁸

But this case has been limited, if not in effect overruled by later cases in the Supreme Court. In *Missouri, K. & T. Ry. Co. v. Wulf*,⁵⁹ the plaintiff, suing in her individual capacity under a Kansas statute for her son's death, was allowed to amend to sue as administratrix, under the Federal Employer's Liability Act. The court was quite emphatic that no new cause was stated, and that the change was in form rather than in substance, since the amendment did not set up a different set of facts. Later cases dealing with amendments and with *res judicata* make it clear that the Supreme Court has adopted a workable theory of the cause of action and has abandoned the law to law rule.⁶⁰

⁵⁶See cases note 49 *supra*.

⁵⁷(1895) 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983.

⁵⁸This rule was then for a time followed in federal and state courts. *Boston etc. Co. v. Hurd*, (C.C.A. 1st Cir. 1901) 108 Fed. 116, 47 C. C. A. 615, (no amendment from claim for conscious suffering of decedent to action for wrongful death); *Anderson v. Wetter*, (1907) 103 Me. 257, 69 Atl. 105 (same); *Despeaux v. Pac., etc., Co.*, (C.C.Pa. 1904) 133 Fed. 1009 (nor from statutory claim for discriminatory charges to common law claim for over-charges); *Hall v. Louisville, etc., Co.*, (C.C.Fla. 1907) 157 Fed. 464 (nor from claim by widow under Florida statute to claim by representative under Federal Employers' Liability Act); *Henderson v. Moweaqua, etc. Co.* (1908) 145 Ill. App. 637 (nor from claim for common law negligence to claim under the Mines Act); *Wingert v. Circuit Judge*, (1894) 101 Mich. 395, 59 N. W. 662 (from claim on Michigan statute to claim on Canadian statute).

⁵⁹(1913) 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed 355. See this case discussed in Clark, *The Code Cause of Action*, 33 Yale L. J. 817.

⁶⁰See *Friederichsen v. Renard*, (1918) 247 U. S. 208, 38 Sup. Ct. 450, 62 L. Ed. 1075, abandoning the "law to law" test, noted in 27 Yale L. J. 1053, 33 Harv. L. Rev. 242; *Seaboard Air Line v. Moennecke*, (1915) 239 U. S. 352, 36 Sup. Ct. 126, 60 L. Ed. 324 (amendment allowed to claim under the federal statute); *N. Y. Cent. Ry. Co. v. Kinney*, (1922) 260 U. S. 340, 43 Sup. Ct. 122, 67 L. Ed. 294 (similar ruling). See also 36 Yale L. J. 853, 14 Georgetown L. J. 407. In *Chicago R. I. & Pac. Ry. Co. v. Schendel* (1926) 270 U. S. 611, 46 Sup. Ct. 420, 70 L. Ed. 757, a similar ruling was applied to the question of *res judicata*. See 35 Yale L. J. 1016, and cf. also *Baltimore S. S. Co.*

The Present Status of the Rule. Since the power to amend rests so largely in the discretion of the court, having in mind the facts and circumstances of a particular case, it is not safe to generalize far and only general tendencies may be noted. It seems clear, however, that the restriction on amendment "from law to law" is losing favor,⁶¹ and that the broader concept of the cause of action as an aggregate of operative facts of convenient size is being generally applied.⁶² In fact in many courts there is very little left of the original restrictive rule. In New York the "law to law" test was early repudiated,⁶³ and the position seems to have been fairly consistently followed.⁶⁴ It was also followed in other jurisdic-

v. Phillips, (1927) 47 Sup. Ct. 60; cf. Reading Co. v. Koons, (1926) 271 U. S. 58, 46 Sup. Ct. 405, 70 L. Ed. 835, as to the date of accrual of a cause for wrongful death under the Federal Employers' Liability Act. See 35 Yale L. J. 1016.

⁶¹See Goldberg v. Friedrick, (1924) 279 Pa. St. 124, 572 Atl. 186, contra to Allen v. Tuscarora Valley R. R. Co., (1910) 229 Pa. 97, 78 Atl. 34, 30 L. R. A. (N.S.) 1096; Friederichsen v. Renard, (1918) 247 U. S. 208, 38 Sup. Ct. 450, 62 L. Ed. 1075; Tinker v. Sauer, (1922) 105 Oh. St. 135, 136 N. E. 854, noted in 32 Yale L. J. 506. See notes in 21 Colum. L. Rev. 289; 36 Yale L. J. 853; 10 Calif. L. Rev. 202. Hepburn, Development of Code Pleading, sec. 306; Pomeroy, Code Remedies, 4th ed., sec. 457.

⁶²As pointed out in the articles, note 54, supra, the size of this aggregate must be pragmatically determined, having regard mainly to consideration of trial convenience. No single rule of thumb is possible. The courts, however, often state such tests as, are the complaint and amendment subject to the same plea. *Goddard v. Perkins*, (1838) 9 N. H. 488; *Proctor v. Southern Ry. Co.*, (1902) 64 S. C. 491, 42 S. E. 427. Does the same evidence apply? *Wabash R. R. Co. v. Bhymer*, (1905) 214 Ill. 579, 73 N. E. 879; *Am. Mills Co. v. Hoffman*, (C.C.A. 2nd Cir. 1921) 275 Fed. 285. Or the same measure of damages? *Hurst v. Detroit City Ry.*, (1891) 84 Mich. 539, 48 N. W. 44; *Messenger v. Northcutt*, (1899) 26 Colo. 527, 58 Pac. 1090; *Am. Mills v. Hoffman*, (C.C.A. 2nd Cir. 1921) 275 Fed. 285. Will an adjudication of one bar the other? *Davis v. N. Y., etc., R. R. Co.* (1888) 110 N. Y. 646, 17 N. E. 733; *Van Patten v. Waugh*, (1904) 122 Ia. 302, 98 N. W. 119. Could both have been pleaded cumulatively in the same court? *Richardson v. Fenner*, (1855) 10 La. Ann. 599. Was plaintiff's intention the same at the time of filing each? *Painter v. New River Mineral Co.*, (C.C.Va. 1899) 98 Fed. 544. Does the amendment state a new and distinct matter? *Chicago, etc., Ry. Co. v. Jones*, (1894) 149 Ill. 361, 37 N. E. 247. Some of these tests such as that of "the same evidence" seem positively harmful, if at all strictly applied: the rest are either wholly vague or state results (e.g. the "res judicata" test.)

⁶³*Brown v. Leigh*, (1872) 49 N. Y. 78. Cf. also, *Watson v. Rushmore*, (1862) 15 Abb. Pr. (N.Y.) 51.

⁶⁴*Hopf v. U. S. Baking Co.*, (1892) 21 N. Y. S. 589 (tort changed to contract); *Deyo v. Morss*, (1894) 144 N. Y. 216, 39 N. E. 81 (tort to contract); *Heath v. N. Y. Bldg. Loan Banking Co.*, (1895) 146 N. Y. 260, 40 N. E. 770; *Smith v. Savin et al*, (1894) 141 N. Y. 315, 36 N. E. 338 (contract to tort); *Levin v. Martin*, (1923) 198 N. Y. S. 827 (under the C. P. A.) But at the trial only amendments which did not substantially change the cause were allowed. *Reeder v. Sayre*, (1878) 70

tions.⁶⁵ In Wisconsin the limitation was adopted at an early date,⁶⁶ but was discarded by the legislature in a statute passed in 1915.⁶⁷ In some jurisdictions an amendment may be had setting up any cause which might originally have been joined with that set forth in the complaint.⁶⁸ But all this raises the question whether the limitation of the same cause of action should be applied at all to the question of amendment. In certain special cases where other rights or rights of other parties have accrued, such as amendment after the statute of limitations has run, or where successive attachments are involved, this or some similar test is obviously and in all fairness required.⁶⁹ But in the ordinary case it seems desirable that the whole of the dispute and all the disputes between the parties be brought out and disposed of as soon as possible and at one time. The court should, of course, be convinced that the disputes are bona fide and the amendment is not for delay, and the opposing party should be protected from surprise by a proper continuance in the few cases where there is actual surprise. Outside of this, there would seem little occasion for restrictions on the

N. Y. 180; *Harris v. Tumbridge*, (1880) 83 N. Y. 92; *Price v. Brown*, (1885) 98 N. Y. 388; *Finch v. Foster Co.*, (1921) 197 App. Div. 172, 188 N. Y. S. 727; *Cox v. Halloran*, (1901) 64 App. Div. 550, 72 N. Y. S. 302; *Block v. Third Ave. R. R.*, (1901) 60 App. Div. 191, 69 N. Y. S. 1107. This rule would seem to be changed under the C. P. A. secs. 105-112, and r. 166. *Smith, Problems in Connection with Motions*, 25 Col. L. Rev. 752; *Medina, Pleading and Practice Under the New York Civil Practice Act 196*; *Copeland v. Hugo*, (1925) 212 App. Div. 229, 207 N. Y. S. 446, allowing such amendment. See *How v. Fox*, (1925) 124 Misc. Rep. 505, 208 N. Y. S. 463; *Stehlisilks Corp. v. Kleinburg*, (1924) 200 App. Div. 899, 205 N. Y. S. 399; *Kent v. Erie R. R. Co.*, (1922) 201 App. Div. 293, 194 N. Y. S. 629. But see *Carmody, New York Practice*, sec. 411; *Rothschild, The Simplification of Civil Practice in New York*, 23 Col. L. Rev. 732, 749; 26 Col. L. Rev. 60.

⁶⁵*Colt Co. v. Kyzer* (1925) 131 S. C. 78, 126 S. E. 520; *Wallard Lumber Co. v. Carolina Portland Cement Co.*, (1926) 134 S. C. 228, 132 S. E. 614; *Raymond v. Railway*, (1897) 57 Oh. St. 271, 48 N. E. 1093; *Pollock v. Lumberman's Nat'l Bank of Portland*, (1917) 86 Or. 324, 168 Pac. 617; *Lovell v. Hammond*, (1895) 66 Conn. 500, 34 Atl. 511; *Dunnett v. Thornton*, (1900) 73 Conn. 1, 46 Atl. 158; *Frankel v. Garrard*, (1903) 160 Ind. 209, 66 N. E. 687; *Steere v. Gingery*, (1909) 24 S. D. 423, 123 N. W. 863.

⁶⁶*Supervisors v. Decker*, (1874) 34 Wis. 378; *Carmichael v. Argard*, (1881) 52 Wis. 607, 9 N. W. 470; *Gates v. Paul*, (1903) 117 Wis. 170, 94 N. W. 55, comparing the Wisconsin and New York views.

⁶⁷Wis. Stat., sec. 2669a. See *Wulfers v. Clark Motor Co.*, (1924) 177 Wis. 497, 188 N. W. 652, (contract to tort); *Jeleniewski v. Eck*, (1921) 175 Wis. 497, 185 N. W. 540, (tort to contract); *Jilek v. Zahl*, (1916) 162 Wis. 157, 155 N. W. 909, ("law to equity"); See 2 Wis. L. Rev. 381; 21 Col. L. Rev. 289.

⁶⁸*Raymond v. Bailey*, (1912) 98 Conn. 201, 118 Atl. 915; Conn. G. S. 1918, sec. 5664.

⁶⁹See discussion below.

broad power of the court to permit amendments even "changing the cause of action."⁷⁰

Amendments by a Defendant. From the statutes quoted above, it would appear that, at least under some codes, a defendant is not to be permitted to amend to change substantially his defense.⁷¹ This in form at least is stated as a general rule.⁷² But generally there are added statements that the same limitations on the power to amend do not apply to the answer as to the complaint.⁷³ Thus in *Bowman v. De Peyster*⁷⁴ in referring to the greater favor accorded the defendant at common law also,⁷⁵ the court said: "The reason for this distinction was, that the plaintiff, if he had another cause of action, could sue upon it afterward, while a defendant had to avail himself of his defense in the action brought against him or he might lose the benefit of it." This argument in favor of the defendant would seem quite conclusive that he should not be deprived of any real defense by an arbitrary restriction on the power to amend.⁷⁶ It would seem, however, to point also to a similar rule in favor of a plaintiff. The penalty on a plaintiff may ordinarily be not as severe as on the defendant, but in modern congested courts it tends to become severe enough in time and expense. And in special cases such as where it is impossible again

⁷⁰Cf. *Lee v. Gallagher*, (1905) 15 Manitoba 677, where the court said the test in England and Canada was not whether the amendment set forth a new cause of action, but whether the adverse party could be compensated for delay or inconvenience by an allowance for costs or otherwise; and *Bowers v. Good*, (1909) 52 Wash. 384, 100 Pac. 848, where Fullerton, J., says: "The fact that the amendment may introduce a new issue is not alone ground for denying it. The true test is found in the answers to the question, 'Is the opposing party prepared to meet the new issue?'"

⁷¹See note 34, *supra*.

⁷²*Frelick v. Mercer*, (1915) 27 Idaho 360, 148 Pac. 906; *Abbot v. Meinken*, (1900) 48 App. Div. 109, 62 N. Y. S. 668; Phillips, Code Pleading sec. 313.

⁷³Bliss, Code Pleading, 3rd ed., sec. 430; Bryant, Code Pleading, 2d ed. 282; *Murphy v. Plankinton Bank*, (1904) 18 S. D. 317, 100 N. W. 614; *Cartwright v. Ruffin*, (1908) 43 Colo. 377, 96 Pac. 261; See *Carmichel v. Argard*, (1881) 52 Wis. 607, 9 N. W. 470, 472.

⁷⁴(1867) 2 Daly (N.Y.) 203.

⁷⁵Cf. *Waters v. Bovell*, (1748) 1 Wils. 223; *Tidd's Prac.*, 2d Am. ed., 653.

⁷⁶*Gould v. Stafford*, (1894) 101 Cal. 32, 35 Pac. 429; *Sutherland*, Code Pl. Prac. & Forms, sec. 805; authorities note 73, *supra*. The common law rule was that an amendment would not be allowed to let in a so-called unconscionable or hard defense, such as the Statute of Limitations. This rule is at least abrogated so that the amendment is within the discretion of the court, and according to some decisions it seems entirely changed. See Bryant, Code Pl., 2d ed., 287; Bliss, Code Pl., 3d ed., sec. 451.

to obtain jurisdiction over the defendant or where the statute of limitations has run, it is fully as severe as in the case of a defendant. The difference at most is only of degree and the wider power to permit amendments would seem desirable.

TIME OF AMENDING

Time when Amendment is Offered as Affecting its Allowance. The time when an amendment is offered is held by the courts to affect its allowance. The earlier it is offered the more favorably it is received. In fact the courts tend to draw a rather definite line between amendments offered before trial and those offered during or after trial. Amendments before trial may consist either of those made without leave of court, within a certain time after the filing of the pleading to be amended, or those made with leave.⁷⁷ In the case of the latter, the leave is ordinarily granted almost as a matter of course and the power of the court to do this is said to be inherent, if there is no statute.⁷⁸ In fact, as noted in the previous section, the present tendency is to grant such amendments even where they may "change the cause of action" or defense set out in the previous pleading, though many early cases were opposed to such change.⁷⁹

Amendments During Trial. When, however, a case has reached the stage of trial the courts are much less liberal in granting amendments.⁸⁰ Under the statutes, the court has discretion to permit the amendment "in furtherance of justice" and "on such terms as may be proper" at any stage of the proceedings.⁸¹ But one of the most usual reasons for the trial court's denial of an amendment is because the party asking it has been guilty of laches. Thus where an amendment to the answer was tendered a year after the answer was filed, it was held not to be an abuse of discretion to deny it.⁸² And where the issues had been completed eight months before trial and defendant had been granted several continuances, the court's refusal to permit an amendment to the answer after plaintiff had put in his proof was

⁷⁷See statute notes 29, 33, 34, *supra*.

⁷⁸*Cf.* Sutherland, *op. cit.*

⁷⁹See cases notes 61-67 *supra*.

⁸⁰*Delaney v. Delaney*, (Mo. 1922) 245 S. W. 1075; *Todd v. Bettingen*, (1907) 102 Minn. 260, 113 N. W. 906, 18 L. R. A. (N.S.) 263; *Burke v. Baldwin*, (1893) 54 Minn. 521, 56 N. W. 173.

⁸¹See statutes, notes 33, 34 *supra*.

⁸²*Goldsburg v. MacConnell*, (1923) 73 Colo. 751, 215 Pac. 872.

upheld.⁸³ Where defendant asked to amend when the trial was almost over, it was not granted because the defendant did not show he had no knowledge of the fact he wished to incorporate into the amendment at the beginning of the trial.⁸⁴

An amendment was also denied when the trial was over because no affidavit was filed showing why the amendment was not sooner tendered.⁸⁵ And, as we have seen, courts tend to refuse an amendment during the trial where it changes the issues.⁸⁶ But the chief element to be considered in allowing or refusing the amendment is whether or not the opposite party will be prejudiced thereby, and if he is not, the court should grant leave to amend.⁸⁷

"The time has gone by when amendments on the trial are to be viewed with suspicion and granted grudgingly. If it appears that the proposed amendment tends to bring the real controversy between the parties fairly before the court, the amendment should always be allowed; opportunity being given to the opposing party to meet it in case of surprise."⁸⁸

Since the trial court has it in its power to condition the amendment upon terms, and thus prevent injustice, an amendment should not of necessity be refused, if the cause of action may be changed. A continuance to protect the interests of the defendant may permit of the eventual adjudication of the disputes between the parties without the necessity of a new suit.⁸⁹

Amendments after Trial. "Amendments after trial are allowed only with great caution and on good cause shown."⁹⁰

⁸³*Osner & Mehlhorn v. Loewe*, (1920) 111 Wash. 550, 191 Pac. 746. Yet an amendment to a petition was allowed three years after commencement of suit in *James v. City of New Orleans*, (1922) 151 La. 480, 91 So. 846.

⁸⁴*Ehlers v. Gold*, (1919) 169 Wis. 494, 173 N. W. 325.

⁸⁵*Christem v. Christem*, (1919) 184 Ky. 822, 213 S. W. 189.

⁸⁶See preceding section, see also *Abel v. Hounsom*, (1920) 107 Kan. 741, 192 Pac. 384; *Commercial Jewelry Co. v. Bowen*, (1919) 145 Minn. 487, 175 N. W. 995; *Long v. Kansas City, M. & O. R. R. Co.*, (1917) 100 Kans. 361, 164 Pac. 175; *Am. Mills Co. v. Hoffman*, (C.C.A. 2nd Cir. 1921) 275 Fed. 285.

⁸⁷*Judish v. Rovig Lumber Co.*, (1923) 128 Wash. 287, 222 Pac. 898; *Lakeside Packing Co. v. M. St. P. & S. S. R. Co.*, (1925) 187 Wis. 350, 203 N. W. 334; *Hobbs v. Ill. Cent. R. R. Co.*, (1917) 182 Ia. 316, 165 N. W. 912; *Bracey v. McGary*, (1919) 134 Md. 267, 106 Atl. 622; *Krueger v. Brooks*, (1919) 94 Or. 119, 184 Pac. 285.

⁸⁸*Mallon v. Tonn*, (1916) 163 Wis. 366, 157 N. W. 1098.

⁸⁹Cf. cases note 70 supra; *Gates v. Paul*, (1903) 117 Wis. 170, 94 N. W. 55; *Scroggin v. Johnston*, (1895) 45 Neb. 714, 64 N. W. 236; *McDonald v. Hulet*, (1901) 132 Cal. 154, 64 Pac. 278. That under the present New York rule such amendment can be had, see note 64 supra. Cf. *Vickery v. N. L. & N. Ry.*, (1914) 87 Conn. 634, 89 Atl. 277; *Sutherland*, Code Pl. Prac. & Forms, secs. 793, 794.

⁹⁰*Sutherland*, Code Pl. Prac. & Forms, sec. 796 citing cases.

Thus it is held no abuse of discretion to deny plaintiff leave to amend, after the evidence is all submitted, or after final argument.⁹¹ So where a contract sued on stated no consideration, the defect could not be cured by amendment after judgment, as the court said the statute permitted amendment of formal defects only.⁹² An amendment setting forth new matters of defense, where the motion was made after judgment for plaintiff, was not allowed during pendency of motion for a new trial.⁹³ But correction of matters of form or to conform the pleadings to the proof⁹⁴ are allowed. In New York an amendment has been allowed setting forth a new cause of action even after a judgment had been satisfied.⁹⁵

Amendments on and after Appeal. An appellate court, during its review of the decision of the lower court, is usually held not empowered to entertain original motions to amend,⁹⁶ but it must confine its adjudication to errors appearing on the record.⁹⁷ If parties die or defendants have not been served or have assigned their interest after the decree of the lower court, the appellate court may permit amendments to serve those purposes.⁹⁸ And issues raised in a trial before county commissioners⁹⁹ or in a chancery court¹⁰⁰ may be amended on appeal. Appellate courts sometimes consider pleadings to be amended so as to conform to proof when no objection to the defect has been taken in the court below.¹⁰¹ In limited cases in some jurisdictions, an appellate court is authorized to allow amendments. A general authority of this kind is

⁹¹McMahon v. Plumb, (1916) 90 Conn. 281, 96 Atl. 958; Thornton v. Goodman, (Tex. Civ. App., 1916) 185 S. W. 926.

⁹²Swift v. Cent. Union Fire Ins. Co., (1919) 279 Mo. 606, 216 S. W. 935 reversing 202 Mo. App. 419, 217 S. W. 1003.

⁹³Nat'l Bank of Commerce v. Pierce, (1920) 280 Mo. 614, 219 S. W. 578.

⁹⁴Matthys v. Donelson, (1916) 178 Ia. 111, 160 N. W. 944; Beachy v. Jones, (1921) 108 Kans. 236, 195 Pac. 184. Such amendments are in the discretion of the court and a denial has been held no abuse of discretion. Breems & Kinnear v. MacWhyte Co., (1924) 101 Okla. 247, 224 Pac. 959.

⁹⁵Hatch v. Central Nat'l Bank, (1879) 78 N. Y. 487.

⁹⁶1 Enc. Pl. & Pr. 607; Manatt v. Starr, (1887) 72 Ia. 677, 34 N. W. 784; McCall v. Webb, (1900) 126 N. C. 760, 36 S. E. 174; Patten Paper Co. v. Green, (1896) 93 Wis. 283, 66 N. W. 601; Note L. R. A. 1916D 841-880.

⁹⁷See Barnes v. Christy, (1921) 102 Oh. St. 160, 131 N. W. 352.

⁹⁸Grant v. Ludlow's Admr., (1857) 8 Oh. St. 1.

⁹⁹Harris v. Millege, (1898) 151 Ind. 70, 51 N. E. 102.

¹⁰⁰Tinker v. Sauer, (1922) 105 Oh. St. 135, 136 N. E. 854. This the court states, is allowed because in Ohio cases from the chancery courts go to the appellate court to be tried de novo.

¹⁰¹Elwood Oil & Gas Co. v. McCoy, (1919) 72 Okla. 97, 179 Pac. 2.

urged by writers and would seem desirable to avoid reversals where an appellate court can itself order correction of pleading defects.¹⁰²

When a case has been remanded by an appellate court to the lower court for a new trial, the trial court is ordinarily left free on retrial to permit amendments to the pleadings.¹⁰³ If the decision is affirmed on appeal and remanded for such proceedings as may be necessary to carry the decree into effect, it is generally held not competent for the lower court to reopen the case to allow amendments.¹⁰⁴

When an appellate court affirms a judgment, the actual enforcement of that decree lies for all practical purposes in the lower court; it would seem that such court should have the power during the same term of court or some similar limited period, to reopen the judgment and allow such amendments as would correct errors in the record or do substantial justice to the parties.¹⁰⁵

AMENDMENTS AND STATUTE OF LIMITATIONS

The rule considered above that an amendment should not state a new cause of action assumes special importance where the statute of limitations would bar a new action at the time it is offered. The general rule is stated that if an amendment to the complaint sets up a new "cause of action" and the Statute of Limitations has in the meantime run against such action, the amendment does not "relate back" to the first action and so it is barred by the statute.¹⁰⁶ But in the application of this rule there is great inconsistency. As

¹⁰²*Tinker v. Sauer*, (1922) 105 Oh. St. 135, 136 N. E. 854; note, 32 Yale L. J. 506; Scott, *Fundamentals of Procedure* 161. In New York under the C. P. A. mistakes, omissions, defects or irregularities may be disregarded or amended on appeal, C. P. A., sec. 105, 109; *Livingston v. Livingston*, (1927) 246 N. Y. 234, 158 N. E. 313; *Piotrowski v. Cervi*, (1924) 210 App. Div. 68, 206 N. Y. S. 655.

¹⁰³*Esch v. Ins. Co.*, (1889) 78 Ia. 334, 43 N. W. 229; *Hardman v. Kelley*, (1905) 19 S. D. 608, 104 N. W. 272; *Smith v. Gavin*, (1894) 141 N. Y. 315, 36 N. E. 338; *Reeves v. Cress*, (1900) 80 Minn. 466, 83 N. W. 443; *Flaherty v. Butte Elec. Ry. Co.*, (1911) 43 Mont. 141, 115 Pac. 40.

¹⁰⁴*Todd v. Bettingen*, (1907) 102 Minn. 260, 113 N. W. 906. See note in 18 L. R. A. (N.S.) 263 for collection of cases in accord. See also *Girard Trust co. v. Null*, (1914) 97 Neb. 324, 149 N. W. 809; *Smith v. Armstrong*, (1870) 25 Wis. 517.

¹⁰⁵*Hardwiche v. Winore*, (1921) 208 Mo. App. 414, 235 S. W. 171; *Clark v. Scoville*, (1910) 198 N. Y. 279, 91 N. E. 800; "Slip Rule," *Rules of Civ. Proc. Am. Jud. Soc.*, Bull. 14, art. 18, sec. 12.

¹⁰⁶Cases *infra* this section. See also *Tiffany, Death by Wrongful Act*, 2nd ed., sec. 187; 17 R. C. L. 817. Cf. *Rules of Civ. Proce. Am. Jud. Soc.*, Bull. 14, art. 18, sec. 4.

we have seen, the rule of the United States Supreme Court was for a time in doubt, but the later cases hold clearly that an amendment changing the basis of claim from state to federal law or otherwise from "law to law," does not state a new cause, and is not barred by limitation provisions.¹⁰⁷ In the state courts, when an amendment changes the plaintiff's claim from one under the Federal Employers' Liability Act to one under a state statute, or vice versa, some jurisdictions have held that a new cause of action is stated and this is barred by the statute,¹⁰⁸ while others, now perhaps more general, hold that this is only an "amplification" of the original action.¹⁰⁹ The latter decisions, it is believed, have interpreted the term "cause of action" more in keeping with modern pleading ideas. The term should be interpreted as referring to facts upon which one or more rights of action are based rather than the rights themselves. Hence a change in legal theory only should not be considered the statement of a new cause. And unless there has been so great a change in the material operative facts that an entirely different fact situation is presented, the amendment should be allowed.¹¹⁰ As illustrating the divergence of

¹⁰⁷See discussion and citation of the United States Supreme Court cases, notes 59, 60 *supra*. The case of *Missouri K. & T. Ry. v. Wulf*, (1913) 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, there cited, allowing an amendment after the period of limitation had run from a claim individually under a state death statute to a claim as administratrix under the Federal Employers' Liability Act, seems to have settled the federal rule.

¹⁰⁸*Capps v. Atlantic Coast Line Ry.*, (1922) 183 N. C. 181, 111 S. E. 533 (death action; decision criticized in 32 *Yale L. J.* 198); *Allen v. Tuscarora Valley Ry. Co.*, (1910) 229 Pa. 97, 78 Atl. 34; apparently overruled, *Goldberg v. Friedrich*, (1924) 279 Pa. St. 572, 124 Atl. 186. Cf. *Breen v. Iowa Cent. Ry. Co.*, (1918) 184 Ia. 1200, 168 N. W. 901 (amendment by defendant refused; decision criticized in 3 *MINNESOTA LAW REVIEW* 59); *Carpenter v. Cent. Vt. Ry. Co.*, (1919) 93 Vt. 357, 107 Atl. 569; noted in 33 *Harv. L. Rev.* 242; *City of Kan. City v. Hart*, (1899) 60 Kans. 684, 57 Pac. 938; *Birmingham Belt R. Co. v. Ellenburg*, (Ala. 1926) 110 So. 709.

¹⁰⁹*Nash v. Minneapolis Ry. Co.*, (1918) 141 Minn. 148, 169 N. W. 540. (Death action; criticized in 3 *MINNESOTA LAW REVIEW* 132); *Edelbrock v. Minneapolis, St. P., & S. S. M. Ry.*, (1926) 166 Minn. 1, 206 N. W. 945, criticized in 10 *MINNESOTA LAW REVIEW* 417; *Lammers v. Chicago Great Western Ry.*, (1919) 187 Ia. 127, 175 N. W. 311, approved in 29 *Yale L. J.* 685. *Vickery v. N. L. & N. Ry.*, (1914) 87 Conn. 634, 89 Atl. 277; *Kansas City W. Ry. Co. v. McAdow*, (1916) 240 U. S. 51, 36 Sup. Ct. 252, 60 L. Ed. 520. See also cases cited, *Clark, Joinder & Splitting of Causes of Action*, 25 *Mich. L. R.* 393, 410. Cf. *Luce v. N. Y., etc. Ry.*, (1926) 241 N. Y. 39, 52 N. E. 409, *aff'g* (1925) 213 App. Div. 374, 211 N. Y. S. 184 claim on Federal Employers' Liability Act barred by previous action on claim under Federal Boiler Inspection Act. 39 *Harv. L. Rev.* 399.

¹¹⁰This view is stated above in this article and is also developed elsewhere, as in the articles cited in note 54, *supra*. In certain recent

views, the following cases allowing the amendment after the statute would bar a new action, may be cited; where it added more particular or different allegations regarding defendant's negligence;¹¹¹ where it alleged that the deceased was killed while being carried as an employee instead of as a passenger;¹¹² where it made a party co-plaintiff who was originally made defendant;¹¹³ where it alleged the provisions of a foreign statute upon which the original action was brought;¹¹⁴ where it charged defendant as an individual rather than in a representative capacity;¹¹⁵ where it set forth that the action was brought by the widow as administratrix instead of by herself and children as the real parties in interest. And the following cases where the amendment was refused;¹¹⁶ where it

law review notes where the "legal theory" view of a cause of action is assumed without consideration of any other view it is believed that both the implications of that conclusion and the opposing authorities, particularly the United States Supreme Court decisions, are overlooked. See 10 MINNESOTA LAW REVIEW 417, 424 and 3 MINNESOTA LAW REVIEW 132, criticizing cases cited note 109 *supra*, 22 Ill. L. Rev. 309, criticizing *Baltimore S. S. Co. v. Phillips*, (1927) 47 Sup. 60, and *cf.* 12 Corn. L. Q. 525, reaching a result critical of both *Birmingham Belt R. Co. v. Ellenburg*, (Ala. 1926) 110 So. 709 and *Luce v. N. Y. & C. Ry.*, (1926) 241 N. Y. 39, 52 N. E. 409 affirming (1925) 213 App. Div. 374, 211 N. Y. S. 184.

¹¹¹*Jeffersonville, M. & I. R. Co. v. Hendricks*, (1872) 41 Ind. 48; *Kuhns v. Wis. I. & N. Ry. Co.*, (1888) 76 Ia. 67, 40 N. W. 92; *Deninger v. Amer. Locomotive Co.*, (C.C.A. 3rd Cir. 1911) 185 Fed. 22, 107 C. C. A. 126; *Chicago, R. I. & Pac. Ry. Co. v. Young*, (1903) 67 Neb. 568, 93 N. W. 922; *Clark v. Ore. Short Line R. R. Co.*, (1908) 38 Mont. 177, 99 Pac. 298.

¹¹²*Kansas Pac. Ry. Co. v. Salmon*, (1875) 14 Kans. 512.

¹¹³*Buel v. St. Louis Transfer Co.*, (1870) 45 Mo. 562.

¹¹⁴*Lassiter v. R. R. Co.*, (1904) 136 N. C. 89, 48 S. E. 642; *Lustig v. N. Y. L. E. & W. R. Co.*, (1892) 65 Hun (N.Y.) 547, 20 N. Y. S. 477; *Louisville & N. R. R. Co. v. Pointers' Adm'r.* (1902) 113 Ky. 952, 69 S. W. 1108.

¹¹⁵*Tighe v. Pope*, (1878) 16 Hun (N.Y.) 180; *Boyd v. U. S. Mtge. & Trust Co.*, (1907) 187 N. Y. 262, 79 N. E. 999. In the *Boyd* case, the court said: "I am satisfied that the amendment allowed in the case at bar does not really bring in a new party in the sense of making one a defendant who was not in any sense a defendant before the process and pleading were amended. It merely changes the capacity in which the same person is sought to be charged. That person having actually been brought into court by the service of the original process, there seems to be no reason why he should not be required to contest upon the merits any cause of action growing out of the facts alleged in the complaint which the plaintiff may have against him in one capacity rather than in another, provided that he is notified by a timely and proper amendment of the precise capacity in which the plaintiff seeks to hold him liable." *McDonald v. Ward*, (1887) 57 Conn. 307, 18 Atl. 51.

¹¹⁶*Pugmire v. Diamond Coal & Coke Co.*, (1903) 26 Utah 115, 72 Pac. 385. See cases collected in (1905) 3 L. R. A. (N.S.) 259. Cf. also *Missouri, K. & T. Ry. v. Wulf*, (1913) 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355.

substituted another beneficiary in place of the one named in the original declaration, and thereby changed the amount of recovery;¹¹⁷ where it set forth a statutory in place of a common law liability for loss of services of a child;¹¹⁸ where it stated a death action in place of an action for personal injuries ultimately resulting in death.¹¹⁹

A recent case, *N. & G. Taylor Co. Inc. v. Anderson*,¹²⁰ has presented in striking fashion the harsh and unnecessary results of the "legal theory" view of cause of action. Here a federal court thought itself bound under the Conformity Act to follow the Illinois decisions, which have carried this view to an extreme,¹²¹ and it therefore disallowed an amendment which merely stated how the plaintiff, an assignee of the claim sued upon, acquired title to it. Under the Illinois statute, such statement was necessary and without it no complete cause of action was stated. The dissenting opinion pointed out that "it was doubtful if the holding would have been adopted by any other state of the union."¹²² While the decision is extreme, it is not merely in line with the Illinois cases, but is at least a logical deduction from the rule here criticised.¹²³

THE DOCTRINE OF AIDER

At common law defects in pleadings might be cured by application of the doctrine of aider. Aider might be had by subsequent pleadings—"express aider"—or by verdict. The common law rules are carried over and to a certain degree extended under the codes.

Aider by Subsequent Pleadings. This occurs most clearly where a material fact not alleged by one party in his pleading, is admitted by the other party in his answering pleading. Thus in the early case of *Brooke v. Brooke*,¹²⁴ the plaintiff brought trespass

¹¹⁷*Atlanta K. & N. Ry. Co. v. Hooper*, (C.C.A. 6th Cir.) 92 Fed. 820, 35 C. C. A. 24.

¹¹⁸*City of Kansas City v. Hart*, (1899) 60 Kans. 684, 57 Pac. 938.

¹¹⁹*Bolick v. Southern Ry. Co.*, (1905) 138 N. C. 370, 50 S. E. 689.

¹²⁰(C.C.A. 7th Cir., 1926) 14 F. (2d.) 353.

¹²¹See e.g. *Walters v. Ottawa*, (1909) 240 Ill. 259, 88 N. E. 651. criticized by Dean Wigmore in 4 Ill. L. Rev. 344; *Davis v. St. Paul Coal Co.*, (1918) 286 Ill. 64, 121 N. E. 181, criticized in 28 Yale L. J. 693.

¹²²*Evans, J.*, (C.C.A. 7th Cir. 1926) 14 F. (2d.) 353, 356.

¹²³For criticism of the case and discussion of the problem raised by the Conformity Act see note, 36 Yale L. J. 853, see also 28 Yale L. J. 693.

¹²⁴(1664) 1 Sid. 184.

against the defendant for taking a hook, but failed to allege in his declaration that the hook was in his possession. The defective declaration was held cured by the defendant's plea which brought out the fact that he had taken the hook out of plaintiff's hands. The doctrine is often resorted to under the codes.¹²⁵ A serious conflict has arisen, however, where the defendant refers to the fact only to *deny* it. New York and some other jurisdictions have asserted *logically* that a *denial* cannot supply the defect.¹²⁶ Other jurisdictions looking less to logic than whether the issue has been fairly raised, have wisely held that a pleading may be aided by such a denial.¹²⁷ It has been held, too, that when plaintiff's pleading goes upon the wrong theory, it is aided when defendant's answer shows the correct one.¹²⁸ It seems generally held that an omission in a cross-complaint cannot be aided by an admission in the other pleadings not responsive to it because a cross-complaint must stand on its own allegations.¹²⁹

Aider by Verdict. Aider by verdict was considered to be founded in the common law and was independent of statutory enactment.¹³⁰ It was said to rest upon "the logical ground that the verdict must be considered as true and as founded on legal evidence and therefore it must be presumed that every fact necessary to warrant such finding was proved on the trial."¹³¹

The extent of the doctrine of aider by verdict at common law and aider by verdict or judgment under the codes is indefinite. A favorite statement is that a defectively alleged cause of action can be cured by aider, but not the statement of a defective cause of

¹²⁵*Lux & Talbot Stone Co. v. Donaldson*, (1903) 162 Ind. 481, 68 N. E. 1014; *Maysville v. Truex*, (1910) 235 Mo. 619, 139 S. W. 390; *Vickery v. N. L. & N. Ry.*, (1914) 87 Conn. 634, 89 Atl. 277; *Thompson v. Jacoway*, (1911) 97 Ark. 508, 134 S. W. 955; *Slack v. Lyon*, (1829) 9 Pick. (Mass.) 62; *United States v. Morris*, (1825) 10 Wheat. (U.S.) 246, 6 L. Ed. 314.

¹²⁶*Scofield v. Whitelegge*, (1872) 49 N. Y. 259; *Tooker v. Arnoux*, (1879) 76 N. Y. 397; Cf. *Vonalstine v. Whelan*, (1901) 35 Cal. 232, 67 Pac. 125, with *Abner Dobie Co. v. McDonald*, (1905) 145 Cal. 641, 79 Pac. 369.

¹²⁷*Whiteley v. So. Ry. Co.*, (1896) 119 N. C. 724, 25 S. E. 1018; *Yellow Poplar Lumber Co. v. Ford*, (1910) 141 Ky. 5, 131 S. W. 1010; *Garth v. Caldwell*, (1880) 72 Mo. 622; *Scott*, *Fundamentals of Procedure* 151; 31 Cyc. 716.

¹²⁸See e. g. *Brown v. Baldwin*, (1907) 46 Wash. 106, 89 Pac. 483; cf. *Whittier*, 8 Col. L. Rev. 535.

¹²⁹*Bullard v. Bullard*, (1922) 189 Cal. 502, 209 Pac. 361. See note 32 Yale L. J. 291.

¹³⁰*Shipman*, C. L. Pl., 3d ed. 531.

¹³¹*Phillips*, Code Pl. 73.

action.¹³² In view of the indefinite meaning attached to the term "cause of action," this is not particularly helpful. A common law case states that:

"Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must in fair construction so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict, that it was so restrained at the trial."¹³³

In fact through all the great number of cases which have struggled with this problem, we find the main question the one which is discussed elsewhere as a fundamental problem of pleading—how specific or how general must the pleader be in his statements.¹³⁴ The farther along the case has progressed, the more intendments are assumed in his favor. Defects of pure form are waived by failure to move or demur; defects of somewhat more serious nature are waived by allowing the case to proceed to verdict or judgment without attacking them; but if a system of written pleadings is to be enforced, after all is said there will necessarily be a class of cases where the court will feel that the pleadings have not served their purpose of bringing out the cause of action even in a general fashion. This is shown by the code provision that the two defects of want of jurisdiction of the subject matter of the action and failure to state a cause of action or defense are not waived by failure to plead or demur.¹³⁵ The test of aider by verdict or by judgment must therefore be vague and indefinite, since it turns on this difference of degree only, and it will rest largely on the circumstances of the particular case. Since the requisite allegation must be contained by "fair intendment" in the pleading itself, apparently the search is to find some general wording which will seem to cover the specific detail now required.¹³⁶

¹³²Tidd, Pr. 919; Shipman, C. L. Pl., 3d ed., 531, 532; Bliss, Code Pl., 3d ed. sec. 438; authorities *infra*; Home Ins. Co. v. Duke, (1881) 75 Ind. 535; Mizzell v. Ruffin, (1896) 118 N. C. 69, 23 S. E. 927; Benedict v. Union Agr. Soc., (1902) 74 Vt. 91, 52 Atl. 110.

¹³³Jackson v. Pesked, (1813) 1 Maule & S. 234.

¹³⁴Clark, The Complaint in Code Pleading, 35 Yale L. J. 259.

¹³⁵Cf. N. Y. C. P. A. sec. 278, 279; Minn. G. S. 1923, sec. 9252 (discussed in the chapter on demurrer).

¹³⁶See cases collected, Am. Dig. Pl. Secs. 431-437; Cf. Garth v. Caldwell, (1880) 72 Mo. 622; White v. Spencer, (1856) 14 N. Y. 247;

Statutes in Aid of Defective Pleadings. In addition to the other statutes of amendment and aider considered in this article, the codes all contain a general provision which follows and often amplifies that stated in the original New York Code of 1848:

"The court shall, in every stage of an action disregard any error, or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."¹³⁷

VARIANCE

Closely akin to the matter just discussed is the problem of variance, that is, the failure of the proof to conform to the case pleaded. At common law objections of variance were made much of, often with harsh results, so that even before the codes, as we have seen, statutes had been passed to mitigate the harshness of the former rule.¹³⁸ The codes generally contain the following sections on variance:

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

"Where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

"Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular

Hill v. Haskin, (1875) 51 Cal. 175; Eberhart v. Reister, (1884) 96 Ind. 478; 5 Tex. L. Rev. 89. As indicated by White v. Spencer, an objection to the evidence may be overruled; in other words a technical entry of verdict may not be required. At common law there seems to have been no method of taking advantage of a defect of this nature after issue joined and before verdict. Scott, Fundamentals of Procedure 148-150. As to aider by verdict in criminal cases, see 6 Va. L. Rev. 285.

¹³⁷First Rep. N. Y. Com'rs. on Pr. & Pl. (1848) sec. 151. The present N. Y. provisions are contained in an entire article, art. 9 of the C. P. A.: of the provisions, sec. 105 deals with mistakes, omissions, defects and irregularities generally; sec. 106, error in ruling of trial court; sec. 107 omissions in taking appeals; sec. 108, relief against defaults; sec. 109, mistake, defect or irregularity as affecting judgment; sec. 110, mistake in court; sec. 111, mistake in remedy demanded; sec. 112, supplying defects by appellate court; cf. also n. 139 infra as to provisions concerning variance. On the other codes cf. Calif. C. C. P. 1923 sec. 475 (expanded from the original form); Ohio Gen. Code 1926, sec. 11364 (also expanded); cf. also Minn. G. S. 1923, sec. 9283.

¹³⁸See notes 4, 5 supra, also the appendix hereto.

or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, but a failure of proof.¹³⁹

In some jurisdictions "whenever it shall be alleged, that a party has been so misled, that fact shall be proved to the satisfaction of the court, by affidavit, showing in what respect he has been misled," before the court is to order the amendment.¹⁴⁰

It will thus be seen that there are contemplated three degrees of lack of correspondence between pleading and proof; immaterial variance, which may be disregarded by the court, or ordered immediately amended without costs; material variance, where an amendment may be ordered on such terms as shall be just; and a complete failure of proof.¹⁴¹ The situation theoretically differs from that considered in the previous section in that there the degree of generality or particularity of allegation was involved; while here the degree of variation between pleading and proof is in question. Yet the dividing line between the two situations is at most shadowy and indistinct; for both will result from a lack of certainty as to the facts of the case in the mind of the pleader. Therefore, while many cases seem to treat the problem of variance as an isolated one, it is in substance the fundamental pleading problem of how a case or defense must be stated.¹⁴² And except as it classifies the degrees of divergence between pleading and proof and suggests remedies applicable to each degree, the cases add little to the general theories of amendment discussed above.¹⁴³

SUPPLEMENTAL PLEADINGS

Supplemental pleadings under the code are the substitute for the plea *puis darrein continuance* of the common law and the sup-

¹³⁹Calif. C. C. P. 1923, secs. 469, 470, 471. Of the many similar statutes, cf. Minn. G. S. 1923, secs. 9281, 9282; Ohio, Gen. Code 1926, sec. 11556.

In New York under the C. P. A. an abbreviated form of the usual provision is found in sec. 434; but this is supplemented by rule 166 which possibly is conflicting since it provides for amendment, seemingly at trial, for failure to state a cause of action or defense and that a complaint or counter claim need not be dismissed at the trial because of failure of or defect in proof, if the evidence can be supplied. For the question as to the construction of this rule, see note 64 *supra*.

¹⁴⁰First Rep. N. Y. Com'rs on Prac. & Pl. sec. 145; Minn. G. S. 1923, sec. 9281; Ohio, Gen. Code 1926, sec. 11556.

¹⁴¹Bryant, Code Pleading, 2d ed., 305; 31 Cyc. 450-452.

¹⁴²For discussion see, Clark, The Complaint in Code Pleading, 35 Yale L. J. 259.

¹⁴³See cases collected Am. Dig. Pl. secs. 386-399. Cf. note on variance in pleading and proof of defamatory words 2 A. L. R. 367; on proving case not pleaded where amendment cannot be made 29 A. L. R. 638, and generally 50 L. R. A. (N.S.) 14; note, 5 Texas L. Rev. 89.

plemental pleadings of equity.¹⁴⁴ They are, however, somewhat narrower than the latter under most codes where they are limited to matter arising after the beginning of an action.¹⁴⁵ The following is a typical provision:

"The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the filing of the former complaint, answer or reply."¹⁴⁶

Under the codes of several states, however, a supplemental pleading may be used to set forth facts which occurred before trial but of which the party was in ignorance at the time of filing his pleading.¹⁴⁷ Due to the freedom of amendment permitted under the codes the difference is largely one of name: whether such matter shall be set up in an amendment or in a supplemental pleading.¹⁴⁸

The granting of a supplemental pleading lies, like an amendment, largely within the discretion of the court.¹⁴⁹ Where new matter within the rules has occurred, and no injury to the other party is shown, it is granted almost as a matter of course.¹⁵⁰ But as in the case of amendments, a supplemental complaint, it is said,

¹⁴⁴*Holyoke v. Admas*, (1874) 59 N. Y. 233; *Shipman*, C. L. Pl., 3d ed., 360-362; *Clephane*, Eq. Pl. 95-97.

¹⁴⁵*Cf. Clephane*, Eq. Pl. 95-97; *Allen v. Taylor*, (1830) 3 N. J. Eq. 435. For the divers code rules, cf. *Guptill v. City of Red Wing and others*, (1899) 76 Minn. 129, 78 N. W. 970, under the usual code, with *Reynolds v. Aetna Life Ins. Co.*, (1897) 16 App. Div. 74, 44 N. Y. S. 691.

¹⁴⁶*Ark. Dig. Stat.* 1921, sec. 1243. This provision, with but slight variations in wording, is found in *Alaska Comp. Laws* 1913, sec. 930; *Cal. C. C. P.* 1923, sec. 464; *Colo. C. C. P.* 1921, sec. 80; *Idaho Comp. Stat.* 1919, sec. 6719; *Burns*, *Ind. Ann. Stat.* 1926, sec. 427; *Kans. Rev. Stat.* 1923, sec. 60-764; *Carroll's Ky. Civ. Code* 1927, sec. 135; *Minn. G. S.* 1923, sec. 9260; *Mo. Rev. Stat.* 1919, sec. 1280; *Mont. Rev. Codes* 1921, sec. 8191; *Neb. Comp. Stat.* 1922, sec. 8660; *N. M. Ann. Stat.* 1915, sec. 4169; *Ohio Gen. Code* 1926, sec. 11368; *Okla. Rev. L.* 1921, sec. 323; *Or. C. C. P.* 1920, sec. 108; *Remington's Wash. Comp. Stat.* 1922, sec. 308; *Wyo. Comp. Stat. Ann.* 1920, sec. 5712.

¹⁴⁷*Iowa Comp. Code* 1927, sec. 11221; *Nev. Rev. L.* 1912, sec. 5076-6134; *N. Y. C. P. A.* 1927, sec. 245; *N. C. Cons. Stat.* 1919, sec. 551; *N. D. Comp. Laws* 1913, sec. 7486; *S. C. Code of Laws* 1922, sec. 440; *S. D. Rev. Code* 1919, sec. 2381; *Utah Comp. Laws* 1917, sec. 6608.

¹⁴⁸*Cf. Murphy v. Plankinton Bank*, (1904) 18 S. D. 317, 100 N. W. 614, where it is held that amendment is the correct way to introduce matter occurring before trial but not known to the parties until afterward.

¹⁴⁹*Pouder v. Tate*, (1892) 132 Ind. 327, 30 N. E. 880; *Medbury v. Swan*, (1871) 46 N. Y. 200; *Copeland v. Copeland*, (1901) 60 S. C. 135, 38 S. E. 269.

¹⁵⁰*Milliken v. McGrath*, (1914) 168 App. Div. 110, 149 N. Y. S. 484.

must not introduce a "new cause of action."¹⁵¹ And if the original complaint fails to state a cause of action, a supplemental pleading cannot supply the omission,¹⁵² because the function of a supplemental pleading is to bring in new facts which "will enlarge or change" the kind of relief to which a party may be entitled, and not to change an unripe action into one fully matured.¹⁵³ But it has been held that the theory of an original pleading may be changed in the supplemental one,¹⁵⁴ and in the "equity" cases a more liberal use of this pleading may be had. Thus where the original bill charged the commission of waste and asked for an injunction, a supplemental bill alleging that in the meantime a mortgage had become due and asking by way of additional relief that the mortgage be foreclosed was permitted.¹⁵⁵ Also, in a divorce action, a supplemental complaint was allowed, which set forth acts of misconduct by the defendant which occurred after the filing of the original complaint.¹⁵⁶ A supplemental petition has been held properly allowed in an action for malicious prosecution, alleging damages incurred after the filing of the petition.¹⁵⁷

Since the defendant does not have an opportunity of bringing a new suit, there is perhaps a greater tendency to allow supplemental answers than complaints, as in the similar case of amendments to answers.¹⁵⁸ Supplemental replies have also been recognized though the occasion for their use is rare.¹⁵⁹

¹⁵¹*Reader v. Farriss*, (1915) 49 Okla. 459, 153 Pac. 678, but with strong dissenting opinion by Sharp, J., who said: "There was no change of parties, the subject matter remained the same and the object of the proceedings was the same." *Maynard v. Green*, (C.C.N.Y. 1887) 30 Fed. 643 (original bill alleged partnership; supplemental bill alleged corporation); *John D. Park & Sons Co. v. Hubbard*, (1910) 198 N. Y. 136, 91 N. E. 261; *Barker v. Prizer*, (1897) 150 Ind. 4, 48 N. E. 4 (slandorous words spoken after the beginning of the action).

¹⁵²*Morse v. Steele*, (1901) 132 Cal. 456, 64 Pac. 690; *Keeler v. Parks*, (1913) 72 Wash. 255, 130 Pac. 111; see 16 Col. L. Rev. 357.

¹⁵³21 Enc. Pl. & Pr. 19; Am. Dig. Pl., secs. 274, 279; cf. *Eveland v. Detroit Mach. Tool Co.*, (D. C., Mich. 1927) 18 F. (2d) 968. Cf. 25 Col. L. Rev. 1057.

¹⁵⁴*Childs v. Kansas City, etc., R. R. Co.*, (1893) 117 Mo. 414, 23 S. W. 373, where the first pleading was framed on the theory that the suit was at law and the supplemental pleading went on an equitable ground.

¹⁵⁵*Allen v. Taylor*, (1830) 3 N. J. Eq. 435. Cf. *Murphy v. United States*, (1926) 16 F. (2d) 595; 27 Col. L. Rev. 606.

¹⁵⁶*Campbell v. Campbell*, (1902) 69 App. Div. 435, 74 N. Y. S. 679; *Otto v. Otto*, (1927) 220 App. Div. 130, 220 N. Y. S. 513 (acts of adultery after institution of action) approved in 27 Col. L. Rev. 748.

¹⁵⁷*Geo. B. Scrambling Co. v. Tennant Drug Co.*, (Ohio 1927) 158 N. E. 282.

¹⁵⁸Cases cited Am. Dig. Pl., sec. 280, 281; cf. *Mackay v. Treat*,

An extensive use of supplemental pleadings is naturally limited by the well known common law view set forth above that the plaintiff's right of action must be mature before he institutes suit. How far this is a desirable view at the present time is perhaps debatable. Of course a plaintiff should not be allowed to harass by litigation a defendant who intends to pay his debt at the proper time. But it would seem that such a defendant could be protected by a pleading showing this situation while at the same time when the parties are actually in court and the obligation is contested the parties may be heard without requiring a new law suit to be brought. This rule was recognized in the former equity cases and its application to "legal" claims would seem in the interest of procedural efficiency.¹⁶⁰

APPENDIX

CHRONOLOGICAL STATEMENT OF THE STATUTES OF JEOfAILS AND AMENDMENTS

The first Statute of Jeofails, passed in 1340, 14 Ed. 111, C. VI is quoted in N. 5, *supra*.

The second Statute, passed in 1384, 8 Rich. II, C. IV is as follows:

"Item, at the complaint of the said commonalty, made to our Lord the King in the Parliament, for that great disherison in times past was done of the people and may be done by the false entering of pleas, rasing of rolls and changing of verdicts; (2) it is accorded and assented, That if any judge or clerk be of such default (so that by the same default there ensueth disherison of any of the parties) sufficiently convict before the King and his council, by the manner and form which to the same our Lord the King and his council shall seem reasonable, and within two years after such default made, if the party grieved be of full age, and if he be within age, then within two years after that he shall come to his full age, he shall be punished by fine and ransom at the King's will, and satisfy the party, (3) And as to the restitution

(1925) 213 App. Div. 725, 211 N. Y. S. 19; 25 Col. L. Rev. 1057; *Hol-yoke v. Adams*, (1974) 59 N. Y. 233.

¹⁵⁹Cases cited Am. Dig. Pl., sec. 282.

¹⁶⁰See the law review notes, cited in notes 152, 153, 155, 156, 158 *supra*; especially 25 Col. L. Rev. 1057, arguing that the prohibition against a new cause of action should be expressly abandoned, as it is in reality in many cases; cf. also *Allen v. Taylor*, (1830) 3 N. J. Eq. 435, note 145, 155, *supra*.

of the inheritance desired by the said commons, the party grieved shall sue by writ of error, or otherwise, according to the law, if he see it expedient for him."

The others are as follows:

(1413) 1 Henry V, c. 5 provided that in original writs, wherein exigent shall be awarded, additions of the defendants' names shall be put, and that surplusage of additions should not prejudice.

(1421) 9 Henry V, c. 4 provided that whereas the Statute of 14 Edw. III was variously interpreted, the King declared that the justices should amend such records and processes as well after judgment as before, in the same manner after as before judgment.

(1425) 4 Henry VI, c. 3 confirmed the preceding statute, continuing it in the reign of Henry VI.

(1429) 8 Henry VI, c.c. 12, 15 provided that no judgment or record should be reversed nor avoided for any writ, return, process, etc., raised or interlined and that the judges might reform all defects in the records, with certain exceptions, in affirmance of judgments; that variance between the record and the certificate thereof should be amended by the judges; and that embezzling of a record, whereby any judgment should be reversed, should be a felony.

(1432) 10 Henry VI, c. 4 provided that whereas entries of appearances had been made in the records of suits in which plaintiffs had never appeared, no officer should make such entry unless plaintiff appeared in person.

(1439) 18 Henry VI, c. 9 made the preceding statute perpetual and provided a penalty for an attorney if he did not record his warrant the same term as exigent awarded.

(1540) 32 Henry VIII, c. 30 provided because of the great delays in suits, after an issue tried there should be judgment given notwithstanding any jeofail or mispleading, default or negligence of any of the parties or their attorneys.

(1576) 18 Eliz. c. 14 enacted that if the verdict of 12 men should be given in any action, suit, etc., the judgment should not be stayed or reversed because of any default of form, or lack of form, touching false Latin or variance or other defaults in form. The act did not extend to appeal of felony or murder, treason or other matter nor to writs of a penal nature.

(1585) 27 Eliz. c. 5. This has been called the most important of the early Statutes of Jeofails and Amendments. See SCOTT, *Fundamentals of Procedure in Actions at Law*, (1922) 144. Some

writers omit it from their list of the Statutes of Jeofails and Amendments, apparently on the idea that it is not strictly a statute of amendment because it governs the construction of demurrers. As it makes many amendments unnecessary, its importance as an amendment statute is great. It is as follows:

"That from henceforth, after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause of the matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specifically and particularly set down and express together with his demurrer; and that no judgment to be given shall be reversed by any writ of error, for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted."

This statute was commented on in *Heard v. Baskerville*, (1612) Hob. 232 by Lord Hobart: "Now the moderation of this statute is such, that it doth not utterly reject form; for that were a dishonor to the law, and to make it, in effect, no art; but requires only that it be discovered, and not used as a secret snare to entrap."

(1623) 21 James I, c. 13, extended the preceding statute.

(1664) 16 & 17 Car. II, c. 8, enumerated the courts and cases in which judgment after verdict should not be stayed for default of form in pleading.

(1705) 4 & 5 Anne, c. 16 provided that where any demurrer should be joined, the judges should proceed and give judgment without regarding any imperfection, omission or defect in pleadings and that all Statutes of Jeofails should be extended to judgments entered on confession, *nihil dicit* or *non sum informatus*, etc.

(1710) 9 Anne, c. 20 extended Statutes of Jeofails to writs of *mandamus* and *quo warranto*.

(1718) 5 Geo. I, c. 13 provided that writs of error varying from the record might be amended.

(1833) 3 & 4 Wm. IV, c. 42 greatly enlarged the powers of amendments at trial in case of variance, in particulars not material to the cause. This it did by providing that the judges at *nisi prius* should have authority to allow pleadings to be amended at the trial when a variance appeared "not material to the merits of the case, and by which the opposite party cannot have been prejudiced in

the conduct of his action, prosecution or defence . . . on such terms as to payment of costs to the other party, of postponing the trial to be had before the same or another jury . . . as such court or judge shall think reasonable."

The statute of Wm. IV was the first result, so far as this subject is concerned, of the wave of pleading reform in England in the nineteenth century. See Clark, *History etc. of Pleading*, 11 Va. L. R. 532, 5 Am. L. S. R. 716. Other steps in this reform, the Common Law Procedure Act of 1852, and finally the Supreme Court of Judicature Act of 1873 are discussed in the text *supra*. These are, of course, more than Statutes of Jeofails and Amendments.